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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LIZANDRO ARTURO PAVON
COLINDRES,

Defendant and Appellant.

E069707

(Super.Ct.No. INF1601306)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey L. Gunther,
Judge. Judgment of conviction affirmed, sentence vacated and remanded with directions.

Christopher Love, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa
Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

After his first trial ended in a mistrial as a result of a discovery violation, a jury convicted Lizandro Arturo Pavon Colindres on one count of making a criminal threat (Pen. Code, § 422)¹ and one count of brandishing an imitation firearm (§ 417.4). In a bifurcated proceeding, the court found true that Colindres suffered one prior serious felony conviction. Colindres was sentenced to a total prison term of seven years eight months.

Colindres contends that the People violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose before trial a recording of a police interview of the People's main witness. As a sanction, Colindres contends that the trial court should have dismissed the charges against him rather than declare a mistrial. We disagree.

In the alternative, Colindres contends that the case should be remanded for resentencing under Senate Bill No. 1393 to permit the trial court to exercise its newly granted discretion as to whether to strike the serious felony conviction for purposes of sentencing. He further contends that the abstract of judgment should be modified because it contains a mistake. The People concede the points about the serious felony conviction and the amended abstract of judgment. We affirm the conviction and remand for resentencing.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND²

A. The Incident

Antwone Lovest was working as a uniformed security guard at a medical clinic on September 6, 2016. Lovest testified that on that morning he saw Colindres exit the back door of the clinic and heard Colindres say that “he should blow the place up,” which Colindres then repeated. Lovest started following Colindres into the parking lot to get Colindres’s license plate number. A female companion of Colindres’s, who was standing next to the passenger side of the car, notified Colindres that Lovest was taking down the license plate number. Colindres turned toward Lovest and asked, “What the eff are you doing?” Lovest explained that he was doing his job by getting Colindres’s license plate number because Colindres had made a threat. Colindres reached into the car on the front driver’s side, pulled out a gun, walked toward Lovest, stopped approximately five feet in front of Lovest, and pointed the gun in Lovest’s face. Colindres threatened to kill Lovest and Lovest’s family. Colindres and his female companion then removed the license plate from the car, got into the car, and drove away.³

After Colindres drove away, Lovest called 911 and explained to the operator that he was a security guard and had just witnessed “this guy [come] out mad at the place and he said he was gonna blow the place up.” Lovest explained that when he attempted to photograph Colindres’s license plate Colindres “pulled a gun out on” Lovest from

² These facts are taken from the trial that began on May 31, 2017.

³ Lovest also testified that the female companion removed the license plate earlier in the exchange.

underneath the front seat of the car, put the gun in Lovest's face, and threatened to kill Lovest and his family. Lovest gave a description of the car and what he remembered to be the first three characters of the license plate.

J. Hobbs and her husband both testified that they witnessed most of what happened. Upon exiting their car in the parking lot they noticed an altercation between Lovest and another man, whom J. Hobbs described as a Hispanic male. (They could not identify Colindres because neither of them saw his face.) The Hispanic man was screaming profanities at Lovest, and Lovest responded by saying that he was doing his job. J. Hobbs heard the Hispanic man telling Lovest to get away from the car, and the husband heard the Hispanic man saying, "I will kill you." The Hispanic man then reached into his car and pulled out a gun. The Hispanic man and a woman got into their car and sped away. As they were driving away, J. Hobbs heard the Hispanic man yell to Lovest, "I'll get you. I know where you live."

Shortly after Colindres drove away, police officers pulled over Colindres's car, detained Colindres, and found an imitation Smith and Wesson revolver under the driver's seat.

B. The Discovery Violation

At the conclusion of Colindres's direct testimony, the prosecutor notified the court and Colindres's attorney that she had just learned that a postarrest interview of Colindres by law enforcement might have been recorded. Though it remained unclear whether the interview had been recorded, Colindres was cross-examined. After Colindres's testimony was complete, a police officer confirmed that he had recorded Colindres's interview and

a pretrial interview of Lovest, the recordings of which the officer then located at the police station. The court declared a mistrial.

C. Sanctions

Colindres moved to dismiss the case under section 1054.5, subdivision (c), arguing that the late disclosure of the recorded interviews amounted to a violation of his right to due process as outlined by *Brady*. The court denied the motion, concluding that the late disclosure amounted to a discovery violation but not a *Brady* violation. In addition to ordering a new trial, the court ordered that neither the recording of Colindres's postarrest interview nor his testimony in the first trial could be used by the People in the retrial.

DISCUSSION

A. Dismissal Instead of Mistrial

Colindres contends that the late disclosure of the recording of Lovest's pretrial interview amounted to a *Brady* violation, for which he contends that dismissal of the charges, not a new trial, was the appropriate remedy. Assuming for the sake of argument that the discovery violation amounted to a *Brady* violation,⁴ we conclude that the trial court did not err by declining to dismiss the charges.

“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” (*Brady*, *supra*, 373 U.S. at p. 87; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) The remedy

⁴ The People do not dispute that there was a discovery violation.

for a *Brady* violation typically is a new trial. (*Wearry v. Cain* (2016) ___ U.S. ___, ___ [136 S.Ct. 1002, 1006] [“new trial is required as a result” of a *Brady* violation]; *United States v. Borda* (D.C. Cir. 2017) 848 F.3d 1044, 1066.)

The People argue that here the trial court was prohibited from dismissing the charges because “subdivision (c) of section 1054.5 *forbids* the use of dismissal as a discovery sanction unless the dismissal is *required* by the federal Constitution.” (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212.) Colindres’s only response to this argument is that subdivision (c) of section 1054.5 does nonetheless *permit* dismissal as a sanction for a *Brady* violation. (*People v. Gutierrez* (2013) 214 Cal.App.4th 343, 352.) That is correct, but by its terms subdivision (c) of section 1054.5 permits dismissal only if it is *required* by the federal Constitution.

Colindres does not cite any authority identifying the circumstances in which dismissal would be required as a sanction for a *Brady* violation, let alone authority showing that dismissal is constitutionally required in this case. He consequently has failed to show that the trial court erred by declining to dismiss the charges.

Instead, Colindres argues that we “should impose a punitive sanction to deter future *Brady* violations.”⁵ No such punitive sanction is constitutionally required, however, so it is not permitted by subdivision (c) of section 1054.5.

⁵ In his reply brief, Colindres requests that we take judicial notice of various articles that were not presented to the trial court that allegedly support his claim about the purportedly high incidence of prosecutorial misconduct in Riverside County. These articles are not relevant to our analysis, so the request is denied. (*People v. Martinez* (2000) 22 Cal.4th 106, 132-133.)

In addition, we note that Colindres did not suffer any prejudice as a result of the putative *Brady* violation. The court declared a mistrial and, at the retrial, excluded not only Colindres's testimony from the first trial but also the recording of his police interview, which would otherwise have been admissible. As a result, at the retrial Colindres was actually better off than he would have been if the recordings had been timely provided to him.

For all of these reasons, we reject Colindres's argument that the trial court failed to impose an appropriate remedy for the putative *Brady* violation.

B. Discretion to Strike Serious Felony Enhancements

Colindres argues, the People concede, and we agree that the amendments to section 667, subdivision (a), and section 1385, subdivision (b), pursuant to Senate Bill No. 1393, allowing a court to strike or dismiss a prior serious felony conviction for sentencing purposes apply retroactively to those like Colindres whose sentences were not final when Senate Bill No. 1393 became effective on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973; Stats. 2018, ch. 1013 (Sen. Bill No. 1393), § 2, eff. Jan. 1, 2019.) We remand so that the trial court can exercise its newly gained discretion as to whether to dismiss or strike the serious felony enhancement for sentencing purposes.

C. Abstract of Judgment

The abstract of judgment erroneously indicates that Colindres received a five-year sentence for an enhancement imposed under section 667.5, subdivision (b). The five-year term was imposed for an enhancement under section 667, subdivision (a). Again,

the parties agree and we concur that the abstract of judgment should be corrected to reflect the sentence imposed. (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

DISPOSITION

The sentence is vacated and the matter is remanded to the trial court to exercise its discretion under section 667, subdivision (a), and section 1385, subdivision (b), to determine whether to dismiss or strike the serious felony conviction enhancement. After exercising its discretion, the trial court is directed to prepare a new abstract of judgment that accurately reflects Colindres's sentence and forward a certified copy to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MENETREZ
J.

We concur:

MCKINSTER
Acting P. J.

MILLER
J.